United Nations AT/DEC/1135

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1135

Case No. 1168: SIROIS Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, Vice-Presid[illegible] presiding; Mr. Omer Yousif Bireedo; Ms. Brigitte Stern;

Whereas at the request of André Sirois, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 December 2000 the time limit for the filing of an application with the Tribunal;

Whereas, on 22 December 2000, the Applicant filed an Application containing pleas which read as follows:

"II: PLEAS

...

9. ... the Applicant most respectfully requests the Administrative Tribunal:

(a) TO ORDER:

(i) that the decision taken by the Secretary-General regarding the Report [of the Joint Appeals Board (JAB)] be rescinded;

(ii) that ... [the International Criminal Tribunal for Rwanda (ICTR)] rectify the Applicant's [date of employment] and pay him salaries and benefits accordingly for the 25, 26 and 27 of September 1995, and ... [compensation of] an

amount equivalent to six months salary, or to pay him a lump sum equivalent to one year salary;

(iii) that ... ICTR pay the Applicant ... extended installation grant ... and ... [compensation of] an amount equivalent to six months salary, or to pay him a lump sum equivalent to one year salary;

(iv) that ... ICTR pay the Applicant ... home leave ... and ... [compensation of] an amount equivalent to six months salary, or to pay him a lump sum equivalent to one year salary;

(v) that [the Office of Human Resources Management (OHRM)] ... revise the Applicant's entry level ... and to compensate the Applicant ... an amount equivalent to one year salary, or to pay him a lump sum equivalent to two years salary;

(b) TO DECLARE null, void and of no effect the decision of the Registrar of the ICTR not to renew the contract of the Applicant;

(c) TO DIRECT [the reinstatement of] the Applicant ...;

...

(f) TO ORDER ... in lieu of specific performance, that the Applicant be compensated the maximum amount of compensation allowed ...;

(g) TO ORDER the Respondent to search and remove from its files ... all detrimental documents ... that it may have filed and/or kept without having previously submitted ... to the Applicant, ... and to compensate the Applicant ... [with] a lump sum equivalent to two years salary, plus one year salary for the exceptional circumstances described herein;

(h) TO ORDER the Respondent to file in all the Applicant's files the documents favourable to him, which have been removed from his files ...; and to compensate the Applicant ... [with] the equivalent of two years salary;

(i) FURTHERMORE TO GRANT the Applicant an amount of $5000 [in costs] ..."

Whereas on 18 December 2000, the Applicant also requested that oral proceedings be held.

Whereas, on 3 June 2001, the Applicant wrote to the Tribunal amending his pleas as follows:

"THE APPLICANT

Respectfully requests the Administrative Tribunal

> TO ORDER ... the Respondent to obtain from his or her client a certificate establishing under oath that each and every fact presented in its Response, should it choose to present one, has been researched and is certified by the Respondent to be true and accurate, and a statement made by any staff member from ICTR who makes a statement in regard of the present case certifying that the facts referred to are to the personal knowledge of that staff member".

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 June 2001 and periodically thereafter until 31 March 2002;

Whereas the Respondent filed his Answer on 26 March 2002;

Whereas the Applicant filed Written Observations on 29 April 2002;

Whereas, on 31 May 2003, the Applicant submitted additional observations;

Whereas, on 16 June 2003, the Applicant submitted a further statement, amending his pleas as follows:

> "III. Finally, I would like to AMEND my statement in order to strike any PLEA or part of PLEA, having to do with:
>
> a) the rebuttal to the [Performance Evaluation Report (PER)];
>
> b) the insertion in my personnal file of detrimental documents ...
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> These have taken a life of their own and are resolved in part.";

Whereas, on 24 June 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant joined ICTR on a one-year fixed-term appointment, at the P-4 level as a Legal Translator/Interpreter, in September 1995. He separated from service on 27 November 1996, at the expiration of his fixed-term contract, but was later re-employed under short-term appointments at Headquarters.

On 5 July 1996, the Applicant requested reconsideration of his entry level, which request was denied.

At the request of the Deputy Prosecutor, on 17 July 1996, the Director of Investigations completed the Applicant's Performance Evaluation Report (PER), giving the Applicant 8 "B" and 3 "C" ratings, on a scale from "A" to "E"

where "A" being the highest. The Director of Investigations also signed the PER as the Applicant's second reporting officer, giving him an overall rating of "a very good performance". The Deputy Prosecutor then signed the PER on 29 July, commenting that he "agree[d] with the evaluation ... except for ... the categories Competence and Quality of Work Performed; which [he] would both rate "A".

On 8 August 1996, OHRM asked the Chief of Administration, ICTR, to make a recommendation on whether the Applicant's appointment should be extended, and to complete his PER. On 12 August, the Chief of Personnel, ICTR, replied that the Tribunal did not wish to renew the Applicant's contract. The Director of Investigations advised the Chief of Administration on 27 August that the non-renewal of the Applicant's appointment must have been "a misunderstanding" as the Office of the Prosecutor wanted the appointment renewed.

On 5 September 1996, the Deputy Prosecutor submitted the Applicant's PER to the Registrar, ICTR, and to OHRM, with a covering memorandum which stated, *inter alia*, "I insist that [the Applicant's] contract be extended. The acute shortage of translators ... will not permit us to let him go ... [and] he is the only legal translator we have."

At the request of the Chief of Administration, on 10 September 1996 the Chief of Language Services evaluated the Applicant's performance. He was critical of the Applicant's work as well as his demeanour, and stated that the Applicant had an attitude problem.

On 12 September 1996, the Prosecutor advised the Registrar that the Director of Investigations as well as the Deputy Prosecutor had indicated that the Applicant's work was excellent and urged her to petition for a renewal. She noted that as she had not studied his file she was not in a position to "comment on any shortcomings", but that "such negative considerations should be carefully weighed against his good work and our pressing needs". The Registrar faxed his response on 17 September, stating, *inter alia*,

> "the decision not to renew [the Applicant's] contract was ... made by me as Registrar. ... I was prepared to look into the matter again following your appeal. I have since reviewed [the Applicant's] personnel file once again ... [G]iven the track record of [the Applicant's] performance and general conduct as evaluated by the immediate supervisor ... [I have no] basis for changing the ... decision.

> ... I would have wished ... to discuss with you what is on file and what I ... personally know about the staff member so that you could have a fuller appreciation of the reasons why I found it difficult to justify retaining [the Applicant's] services."

The following day, the Prosecutor notified the Registrar that she maintained her support of the Deputy Prosecutor's request remarking that "[t]his decision must ultimately be founded on the basis of the facts reflected in the file, which is why I did not see the need to discuss with you any matter within your personal knowledge about this staff member".

On 18 September 1996, OHRM responded to the Chief of Administration's 27 August letter and stated that, "in view of the [Applicant's] fully satisfactory service ... OHRM is of the view that [he] should be given an opportunity to continue serving the Organization", and, in particular, his contract should be extended for a period of three to six months to permit completion of the rebuttal procedure. The following day, the Chief of Administration reiterated his opposition to an extension and indicated that the Applicant's PER had not been completed by his supervisor, the Chief of Language Services, but that the latter had provided an evaluation which supported the Chief of Administration's recommendation. OHRM replied that a two-month extension should be given to allow for the completion of a proper PER and that the evaluation provided by the Chief, Language Services, would not suffice.

On 19 September 1996, the Applicant signed his PER, indicating that he intended to rebut same.

On 1 October 1996, the Applicant was formally notified that his appointment was extended for two months, until 27 November 1996. He was advised that the Officer-in-Charge of Administration had been instructed to prepare a new PER and that the Chief, Language Services, and the Deputy Prosecutor would be first and second reporting officers, respectively.

On 27 November 1996, the Applicant separated from service.

On 5 September 1997, the Applicant requested administrative review of the Administration's failure to commence the PER rebuttal procedure and its decision not to renew his fixed-term appointment.

On 8 January 1998, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 10 December 1999. Its considerations and recommendations read, in part, as follows:

> "**The Panel's considerations regarding procedure**
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> 35. Firstly, the Panel considered whether the present appeal was receivable. ...
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> 36. ... The Panel felt that the circumstances of the present appeal warranted a waiver of the time-limit, but only in regard to those appeals contained in the [Applicant's] notice of appeal to the JAB, dated 8 January 1998 ...
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> **The Panel's considerations regarding the merits of the Appeal**
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> ...
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> 38. The Panel ... concluded that the [Applicant] had no right to, or expectation of, renewal.
>
> 39. The Appellant contends that only OHRM had the authority to decide whether to renew his appointment ... However, the Panel noted that significant correspondence regarding the [Applicant's] reappointment flowed between the Office of the Prosecutor, the OHRM and the Office of the Registrar. The sum of this correspondence ... suggests that [the Office of the Prosecutor] and OHRM both understood that the Office of the Registrar had the final say over the [Applicant's] reappointment. Thus, the Panel was reluctant to recommend a remedy based upon a legalistic construction of, what appears to have been, the actual managerial organisation of the ICTR.
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> ...
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> 41. The Panel noted that [the Registrar] asked [the Chief of Language Services] to write the letter after [the Registrar] had decided not to renew the [Applicant's] appointment. ... Thus, the Panel concluded there was no evidence that the Registrar had based his decision not to renew the ... appointment upon the contents of [the] letter. Moreover, the Panel felt that the facts of the present case offered explanations for non-renewal other than the Registrar's impropriety. Thus, the Panel concluded there was insufficient evidence to warrant a finding that 'prejudice' or 'extraneous factors' motivated the Registrar's decision not to renew the [Applicant's] contract.
>
> 42. Nevertheless, the Panel does feel quite strongly that [the Registrar] and [the Chief of Language Services] acted improperly by placing the documents detrimental to [the Applicant] in his personnel file without giving him appropriate notice. ...
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> ...
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> 44. The Panel felt that it could not properly consider the Appellant's remaining pleas, since these were time-barred.

Recommendation

45. The Panel recommends that the Secretary-General compel the ICTR [to] search its files and remove all documents detrimental to the [Applicant] that were filed without notice to [him].

..."

On 18 May 2000, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

> "[t]he Secretary-General is in agreement with the Board's conclusions and recommendation and ICTR will be requested to remove from all files, including yours, material detrimental to you which has been filed or kept without notifying you of its existence".

This copy of the JAB report bore a different signature sheet to the copy sent to the Applicant on 29 February by the Secretary of the JAB.

On 22 December 2000, the Applicant filed the above-referenced Application with the Tribunal.

On 4 January 2001, the Rebuttal Panel issued its report on the Applicant's case. It concluded, inter alia, that ICTR had disregarded ST/AI/240 paragraph 2 in accepting a PER prepared by someone other than the Applicant's supervisor, and in failing to respect the time limits provided for hearing a rebuttal. The Panel recommended that the "B" ratings the Applicant had received in three categories be raised to "A", and noted that "no staff member should be treated unfairly ... and ... no Rebuttal Panel should be made to decide on a case without being able to hear ... the staff member's supervisor". On 11 April 2002, the newly appointed Registrar transmitted a copy of the report to the Applicant and informed him that he supported the conclusions of the Panel and "sincerely regret[ted] the protracted delay", and that copy of the report had been placed in his personnel file.

Whereas the Applicant's principal contentions are:

1. The decision of the Secretary-General is ill founded in fact and in law; the report and recommendations of the JAB are ill founded in facts and in law.

2. The Registrar of ICTR did not have the authority to make a decision regarding the extension of the Applicant's contract. Further, the Registrar's decision was based on irregular grounds and the Applicant was the victim of prejudice.

3. The Applicant's human rights, rights under the Staff Regulations and Rules, and rights of due process were violated by the JAB. In particular, the composition of the panel was changed without him being notified; the Secretary of the JAB failed to provide the Applicant with a copy of the "confidential" statement of defense filed by the Respondent in his case; the report was inaccurate and incomplete; and, different copies of the report bore different signature pages.

4. The JAB erred in finding part of the Applicant's appeal time-barred.

5. Notwithstanding its letter of 18 May 2000, the Respondent has not removed the offending material from the Applicant's file.

Whereas the Respondent's principal contentions are:

1. The Applicant's claims other than those presented in his original letter of appeal are time-barred.

2. The Applicant had neither the right nor the legal expectancy of continued employment with the United Nations.

3. The decision not to renew the Applicant's fixed-term contract was not motivated by prejudice, discrimination, bias or other extraneous factors.

The Tribunal, having deliberated from 24 June to 25 July 2003, now pronounces the following Judgement:

I. The Applicant worked as a legal translator/interpreter at the International Criminal Tribunal for Rwanda (ICTR) by which he was recruited in September 1995 - on either 25 or 28 September, the date being in dispute between the parties - on a one-year fixed-term appointment that was extended for two months. The Registrar of the Tribunal refused to renew his second contract and the Applicant left his post on 27 November 1996. The Applicant filed a number of appeals subsequent to those events.

II. On the one hand, he disputed the mid-term report made during his first contract. His performance evaluation report was signed by the Director of Investigations on 17 July 1996 and included eight "B" and three "C" ratings, and an overall assessment reading "a very good performance". It was also signed on 29 July 1996 by the Deputy Prosecutor who said that he agreed with the evaluation except for the categories "Competence" and "Quality of work performed" for which he proposed an "A" rating. The Applicant disputed that evaluation. At the date of submission of his application, the Rebuttal Panel had not yet taken a decision, a fact which prompted the Applicant to state that "(m)ore than *four years* and hundreds of pages of correspondence later, the Applicant is still waiting" (emphasis added by the Applicant). There is also a certain irony in the fact that the Applicant's one-year contract was renewed for two months in September 1996, supposedly to enable the Rebuttal Panel to review his performance report! Finally, the Rebuttal Panel made its report on 4 January 2001, in other words five and a half years after the initiation of the procedure. The procedure for establishing the Rebuttal Panel, as described by the Applicant in his Application was utterly bizarre. Ultimately, "the process became even more absurd when the ICTR started deciding not to renew the contract of those members the Applicant had accepted for his Rebuttal Panel". In its report, the Rebuttal Panel criticized the performance evaluation on grounds of both procedure and substance. It concluded that ICTR had disregarded administrative instruction ST/AI/240 by accepting a performance evaluation report prepared by someone other than the Applicant's supervisor, recommended that three "B" ratings be changed to "A", criticized the fact that the procedure had taken place without giving a hearing to the Applicant's supervisor and finally expressed its regret at the "protracted delay". In a letter sent on 16 June 2002 to the Tribunal, the Applicant stated: "I would like to **AMEND** my statement in order to strike any PLEA or part of PLEA, having to do with ... the rebuttal of the PER" (emphasis added by the Applicant). The Tribunal will not therefore consider the pleas that the Applicant had submitted because his Rebuttal Panel had not taken any decision at the time of his application, but considers that a summary of the circuitous complexities of the procedure helps to provide an overall view of this case.

III. The Applicant also challenged the decision not to renew his contract before the Joint Appeals Board (JAB) which submitted its report on 10 December 1999, which was transmitted to the Applicant on 3 March 2000. In its report, the JAB decided that the Applicant had no right to be re-employed because a practice described as "managerial organization" had developed within ICTR which seemed to confer on the Registrar the power of appointment which he used with respect to the Applicant. Furthermore, in the view of the JAB, the Registrar did not abuse his authority and the other pleas of the Applicant should not be considered because they had been submitted out of time. In order to justify the decision by the Registrar not to renew the Applicant's contract, the JAB began by indicating that it acknowledged the competence of the Registrar in that regard on the basis of the following analysis:

> "... the Panel noted that significant correspondence regarding the Appellant's reappointment flowed between the Office of the Prosecutor, the OHRM and the Office of the Registrar. The sum of this correspondence, in the Panel's opinion, *suggests* that OTP and OHRM both understood that the Office of the Registrar had the final say over the Appellant's reappointment. Thus, the Panel was reluctant to recommend a remedy based upon a *legalistic construction* of, what *appears* to have been, the actual *managerial organisation* of the ICTR" (emphasis added by the Tribunal).

It would be difficult to engage in a more impressionistic and vague process of reasoning than this; such an analysis hardly seems capable of ensuring protection of the rights of employees.

However, the JAB criticized the action of the Administration in its handling of the personnel file of the Applicant stating: "... the Panel does feel quite strongly that [the Registrar] and [the Chief, Language Services] acted improperly by placing the documents detrimental to [the Applicant] in his file without giving him appropriate notice". Consequently, the recommendation in the JAB's report was "that the Secretary-General [should] compel the ICTR to search its files and remove all documents detrimental to the Applicant that were filed ... without notice to the Applicant", thus giving the Applicant satisfaction on this point. But the JAB did not, however, conclude that the Registrar had used his authority in an arbitrary fashion and considered that he had not acted on the basis of the defamatory document:

"... the Panel *felt* that the facts of the present case offered explanations for non-renewal other than the Registrar's impropriety" (emphasis added by the Tribunal).

By letter dated 18 May 2000, the Secretary-General informed the Applicant that he would accept the report of the JAB and attached to his letter a copy of the report of 10 December 1999 which was not identical to the version received earlier by the Applicant.

IV. The Applicant is, on the one hand, appealing to the Tribunal against the decision by the Secretary-General accepting the report of the JAB and, on the other, complains that even the very limited recommendations in the report were not complied with. Moreover, the Applicant asks the Tribunal to rule on a certain number of pleas which the JAB regarded as being out of time and did not therefore consider: on that basis, he asks first that he should be paid for his days of work from 25 to 27 September 1995, since the Applicant maintains that he began to work for ICTR on 25 September and not 28 September 1995; second, he asks to be granted an "extended installation grant on the same basis used for other ICTR employees in a similar situation at the same time at Kigali"; third, he asks to be paid for "some home leave according to the [United Nations] rules as applied to [United Nations] employees in Kigali in 1995-1996"; fourth and last, he asks for the level at which he was recruited to be reviewed, a request he had made constantly throughout his contract. For each head of compensation the Applicant asks for damages and interest in order to "compensate the Applicant for the injury caused to him by the non-payment of this amount to him by the ICTR and for the administrative ordeal the Applicant had to go through for more than 4 years in order to get paid". Moreover, the Applicant asks for $5,000 compensation "to reimburse him for some of the enormous amount of expenses in long-distance telephone calls, faxes and photocopies as well as travel expenses for several trips he had to make to [United Nations] Headquarters in New York". The Applicant indicates that the action by the Administration caused him considerable damage since, having been ranked first in a worldwide United Nations examination for French translators, he received no offer of a post for a period of four years.

V. The Respondent, for his part, considers on the one hand, with respect to procedure, that all the pleas that were not specifically set forth in the initial letter of appeal are time-barred and irreceivable. Furthermore, as regards substance, the Respondent defends the action by the Registrar of ICTR, even though the latter was obliged to resign following the inquiry carried out by the United Nations. The Respondent argues that, in any case, the Applicant had neither the right nor the legal expectancy of having his contract renewed and that the Registrar acted correctly within the framework of his discretionary authority because "(t)he decision not to renew the Applicant's fixed-term contract was not motivated by prejudice, discrimination, bias or other extraneous factors" and lastly that the Secretary-General was right in following the recommendations of the JAB. Curiously, not a single line of the Respondent's Answer addresses the question of the competence of the Registrar to act in respect of personnel management matters.

VI. The Tribunal will begin by considering the question of the receivability of the various pleas, in particular that of the pleas that the JAB regarded as irreceivable. The JAB considered the pleas submitted in the various "Amendment(s) to the Statement of Appeals" as late and therefore incapable of being entertained, even though it accepted the main plea. There is, however, a certain contradiction in the approach of the JAB which, on the one hand, acknowledged that exceptional circumstances justified the filing of the appeal outside the time limits and, on the other hand, did not accept the filing of additional pleas during the procedure.

VII. The Tribunal considers that the circumstances of the present case are sufficiently unusual and exceptional to justify not insisting on unduly strict compliance with the time limits as that would risk depriving United Nations staff members of their rights. It wishes merely to recall briefly the situation in ICTR at the relevant time, as described by the Applicant:

> "The Applicant does not consider it feasible to repeat here all those circumstances ... Suffice to say that: (a) Most staffers of the ICTR had never worked for [the United Nations] before and did not know the Rules and Regulations of [the United Nations], and surely this was the case of the Applicant; (b) as the official position of the Registrar and of the administration of the ICTR was that [the United Nations]Rules and Regulations did not apply to the ICTR and that the staff members could

> not avail themselves of those Rules and Regulations... these staff members were never given access to any of these documents by the administration of ICTR; (c) the administration of the ICTR actively prevented the staff members from having access to any information from the Secretariat, going so far as to refuse to pay the phone bill of the ICTR in Kigali or to pay for the necessary repairs to the telephone lines and forbidding staff members - including the Applicant - to pay the phone bills of the ICTR with their own money, which in effect cut them from the rest of the world; (d) the communications between the four offices of ICTR (Arusha, Kigali, The Hague and New York) and between them and NYHQ was extremely difficult at best, because of their remoteness, because of technical problems and because of the different time frames, and access to information was always nearly impossible; (e) add to this, other specific actions as: when the Registrar learned that the Applicant was contacting the Secretariat in New York, he had someone remove the telephone *and even remove the telephone wirings* of the wall from the office of the Applicant, and then (f) he forbade the Communications Unit to place any phone calls and send any faxes for the Applicant, even at his own expenses" (emphasis added by the Applicant in his Application).

The Tribunal will therefore consider the pleas that were rejected by the JAB even though the JAB did not consider them on the grounds that they had been submitted late. The Tribunal will, however, begin by considering the main plea of the Applicant which asks the Tribunal "TO DECLARE null, void and of no effect the decision of the Registrar of the ICTR not to renew the contract of the Applicant", a plea which he had already submitted to the JAB but which the latter had rejected.

VIII. The Tribunal notes that the Applicant has made numerous criticisms as regards both form and substance of the JAB's report. On the one hand, the Applicant refers to numerous procedural irregularities in the handling of his case before the JAB. He summarizes as follows his criticisms of the procedures adopted in dealing with his case:

> "the result of all this is that: (a) for the same Appeal, the Applicant is given two (2) different Panels, three (3) different signatures pages, three (3) different secretaries to the Panel, and at least two (2) different versions of the report and recommendations and not one (1) word of explanation".

In addition to these procedural errors, the Applicant maintains with respect to substance, that the report of the JAB was based on reasoning that was legally without merit:

> "... some of the recommendation of the Panel rely on inventions of its own rather than facts and findings, e.g.:
>
> > (i) Disregarding clear uncontrovertible evidences originating from ICTR and OHRM themselves, including a letter from the Registrar of ICTR himself, stating that the Registrar did not have the authority to take the decision he took the Panel choose to invent some heretofore unheard of 'managerial organization' ... that, according to the Panel would have been sufficient to cover the actions of the Registrar".

Lastly, with respect to the follow-up to the JAB report, the Applicant indicates that around the middle of October 2000, he learned that the Respondent had not honoured his undertakings to comply with that report. He stated as follows in his Application:

> "... by mid-October 2000, the Applicant was able to ascertain that even the very narrow recommendation rendered in his favour has not been complied with. He checked his personal file at OHRM/UNHQ Secretariat and *discovered that the recommendation concerning the removal of 'all documents detrimental to the Applicant' had not been complied with and that actually his file contained MORE 'documents detrimental' to him than he had previously know[n]*" (emphasis added by the Applicant).

In other words, the main questions confronting the Tribunal are first issues of procedure, then issues of substance raised by the JAB report, to say nothing of the various pleas that were not considered by the JAB.

IX. As regards procedure, the Tribunal must now consider whether the handling of the Applicant's file by the JAB afforded the Applicant the safeguards of a proper and transparent procedure. Without entering into all the highly complex and surprising details of this case, the Tribunal considers as proved a certain number of disturbing elements: the initial composition of the JAB, which was accepted by the Applicant, was changed without his being informed; the report of the JAB sent to the Applicant in March 2000 was not signed by the same people — who were themselves different from the people initially appointed — as the ones who had signed the report that was transmitted to him in May 2000; the report which had been countersigned and accepted by the Under-Secretary-General for Management was not the report that was initially sent, since the report that was finally transmitted to the Applicant contained repeated references to paragraph numbers which did not appear in the initial report, a fact that

constitutes serious evidence in support of the Applicant's argument to the effect that the report was amended after its adoption; a Respondent's brief marked "confidential" which was never sent to him was found by the Applicant in his JAB file. Moreover, the Applicant in a similar case involving the same Registrar, unlike the present Applicant, was awarded substantial damages with interest, a fact which seems to indicate discriminatory treatment by the JAB. Without wishing to become involved in an investigation that would shed full light on this matter, and without its being necessary to accede to the Applicant's request that the Tribunal should give a hearing to the former and new members of the JAB, the Tribunal considers that the facts of the case have brought to light extremely serious malfunctions in the entire process of the review, by the JAB, of administrative decision-making: these facts are sufficient grounds in themselves for considering that the Applicant was not accorded due process.

X. But the Applicant also complains of the way in which the JAB handled his appeal in another respect. The Applicant is requesting that the JAB should be called to order for having quoted at length in its report, which was intended to be published, the defamatory passages in a document about which he was complaining. As the Applicant points out such practices should be condemned:

> "To accept this would mean that any staff member who would avail himself or herself of Administrative Instruction ST/AI/292 would run the risk of seeing the most damaging and unfounded accusations he or she would be complaining about being quoted at length, even in full, by the Panel of the JAB which could hypocritically recommend that the administration remove the document from the staff member's file, while ensuring at the same time that those accusations stay permanently in the file, and with more authority, via the Report of the Panel, and without giving the employee a single chance of refuting such accusations. That kind of administrative hypocrisy deserves to be unequivocally condemned by the Administrative Tribunal".

The Tribunal does indeed condemn such practices which run counter to the purpose to be served by the existence of Joint Appeals Boards which are part of the process established by the United Nations to safeguard the rights of its staff members.

XI. On the main question of substance which concerns the non-renewal of the Applicant's contract, it is part of the task of the Tribunal, to establish first whether the Registrar was entitled to terminate the fixed-term contract of the Applicant and secondly whether, assuming the finding that he did indeed have such authority, whether he exercised that authority in an arbitrary manner on the basis of improper motives. In considering the second point, the Applicant castigates the JAB for not having taken into account, in its review of the issue of the non-renewal of his contract, the "two Reports of the OIOS which were so critical of the mismanagement of the ICTR that it lead to the forced resignation of the Registrar and of the Acting CAO and the forced departure of most of the main officers of the administration of the ICTR in the Registry's office".

XII. The first question that the Tribunal must answer is therefore whether the Registrar had the necessary authority not to renew the Applicant's contract. Part of the answer to that question is provided by the correspondence sent by the Registrar to the Secretariat in New York in which he asked to be granted such competence, thereby clearly implying that he did not have it. The facts in the file clearly indicate that such authority had not been delegated to the Registrar at the time when he opposed the renewal of the Applicant's contract. Thus, by way of example, a letter of 8 May 1996 sent by the Assistant Secretary-General for Human Resources Management to the Assistant Secretary-General, Office of Programme Planning, Budget and Accounts, Controller, entitled "International Criminal Tribunal for Rwanda — Delegation of authority on International Criminal Tribunal" contains the following:

> "Although a very extensive delegation of authority on personnel-related matters was given early to the International Criminal Tribunal for the former Yugoslavia (ICTY), a decision was taken last year to proceed differently with the start up phase of ICTR on account of several factors ... In this connection, I should mention that the vast delegation of authority granted to ICTY in relation to personnel-related matters did yield some undesirable consequences which we did not want to see repeated in the case of ICTR ... It was for this reason that ... the delegation of authority was delayed in the case of ICTR ... We are presently negotiating with ICTR the terms and exact timing for the granting of a delegation of authority in relation to the recruitment and administration of international staff. A mutually convenient schedule will be worked out soon between OHRM and ICTR with a view to delegate authority on personnel-related matters as soon as possible, but not later than 1 January 1997".

That time frame was not met but authority was indeed delegated with respect to personnel matters. It appears from an examination of the file that authority was delegated to the Registrar for the first time in October 1997, in other words **more than a year after the Registrar took the decision not to renew the Applicant's contract**.

XIII. The Tribunal shares the opinion of the Applicant that the casualness displayed by the JAB in justifying the conferral by the Registrar of authority on himself should be condemned:

> According to the Applicant:
>
> "The Panel tries to avoid the main question by claiming that it is 'what appears to have been the actual managerial organization' that gave to the Registrar the authority to do what he did. It is in itself a statement of very grave consequences, not only for the Applicant, but for the administration of [the United Nations]as a whole, to claim that the 'appearance' of a 'managerial organization', whatever this means, supersede all the applicable rules and regulations of [the United Nations]. This would mean quite simply that any [United Nations]official could justify his or her refusal to comply with [the United Nations]rules or regulations by invoking the 'appearance' of some 'managerial organization' in his or her service that would supersede [the United Nations]rules or regulations. Obviously, the result would be pandemonium".

The Tribunal agrees with that analysis. There is no doubt that a strange, despotic and capricious form of organization was put in place by the Registrar and the Chief of Administration, ICTR, but far from justifying the activities undertaken with respect to the Applicant, that form of organization was severely criticized in their dealings with Office of Internal Oversight Services (OIOS) by the Director of Finance, the President of the Tribunal and the Judges. In the OIOS report, annexed to the report of the Secretary-General on the Activities of the Office of Internal Oversight Services (A/51/789 of 6 February 1997), the attitude of the Registrar, who had usurped full powers and imposed his own authority, not to say his authoritarianism, was highlighted. In paragraph 8 of the above-mentioned report it is stated that:

> "According to the Registrar, he has absolute authority when it comes to any matter with administrative or financial implications. Because of this perception, almost no decision can be taken by the other organs of the Tribunal that does not receive his review and agreement or

> rejection. In the opinion of OIOS, this must change to more accurately reflect the servicing function of a Registry".

The result was the forced resignation of the Registrar and the Chief of Administration, ICTR, following the OIOS report which was particularly critical of the management of ICTR.

XIV. The Tribunal, having examined the relevant texts, considers that the non-renewal of the Applicant's contract was not in accordance with legal procedures and was not decided by an authority competent for that purpose. The proper procedure was as follows: the Applicant's supervisor (who was, in fact, the Deputy Prosecutor) should have transmitted a recommendation to the Administrative Officer who, in his turn, should have transmitted it to OHRM in New York which alone had the authority to take a decision. The system did involve two levels of authority: one which was empowered to make a recommendation and the other which had decision-making authority. But the Registrar was not supposed to be involved at either level. The Registrar himself was perfectly well aware that he had no authority not to renew the Applicant's contract. In a letter addressed to OIOS dated 2 January 1998, the Registrar wrote:

> "As OIOS knows very well, the Tribunal's recruitment was, up to 1 October 1997 when delegation of recruitment authority was made to the Tribunal, fully the responsibility of OHRM."

From its study of the information on the case, the Tribunal draws the conclusion that the Registrar had no legal authority not to renew the Applicant's contract at the time when his fixed-term contract expired.

This abuse of authority was, moreover, condemned by the United Nations General Assembly in its resolution 53/213 of 10 February 1999, in which it stated:

> "11. *Emphasizes* that the delegation of authority for human resources management should be strictly in accordance with the existing Staff Regulations and Rules of the United Nations".

XV. The Tribunal is next requested to declare that even if the Registrar had been competent, he used his authority abusively and based his decision on motives extraneous to the interest of the service. According to the Applicant, "(t)he Applicant notes that all these violations of due process, human rights and basic

principles of law are not just the result of negligence or incompetence, but that they show a clear pattern of partiality", which he explains as follows:

> "In fact, the existence of the extraneous factors for the Registrar has been amply established in the OIOS Reports on the ICTR in the description OIOS made of the administrative war the Registrar was waging against the Office of the Prosecutor in Kigali and against whomever he perceived as being in his way, which happened to be whoever was honest and competent, who, because of this very fact, was suspected of having denounced to OIOS and to the Secretary-General the corruption and the mismanagement of the Registrar and his cronies. The non-renewal of the Applicant's contract was one of the first measures of reprisal taken against the competent and honest employees of the ICTR, but it was only one of a series, as the pattern was confirmed by the non-renewal of the contract of the Director of Finances".

These criticisms were stated even more specifically to the JAB which summarized them as follows:

> "The Appellant contends that 'prejudice' and 'extraneous factors' motivated the Registrar's decision not to renew the Appellant's appointment ... The Appellant's contention envelops two lines of reasoning. Firstly, the Appellant contends the Registry of the Tribunal violated his rights under ST/AI/292 by including [the letter of the Chief, Language Services] in his personnel file without granting him prior notice of the letter, and an opportunity to rebut its contents ... The Appellant further contends that the Registrar used this document to justify the non-renewal of his contract ... The Appellant concludes that since the Registrar purportedly based his decision on an improper PER, that decision is itself improper. Finally, the Appellant contends that the totality of the circumstances surrounding [the Chief, Language Services'] letter - from the Registrar's request for this letter, to the placement of that letter in the Appellant's personnel file - evince bad faith on the part of the Registrar and Chief, Language Services."

The Respondent answers that, by saying that the Applicant had no right or legal expectancy of the renewal of his contract and that the Administration has the discretionary authority not to renew fixed-term contracts, where the exercise of such authority is not vitiated "by prejudice, discrimination, bias or other extraneous factors".

XVI. It follows, however, from the conclusion already reached by the Tribunal - namely that the Registrar had no competence to decide not to renew the Applicant's contract - that it is not necessary in principle for the Tribunal to consider the internal functioning of ICTR, which has already been very severely

criticized by OIOS, in order to establish whether the Registrar, if he had had the competence to do so, should be regarded as having used his authority abusively, in a biased manner, basing his decision on a substantially non-existent reason. What happened at Kigali was, however, so unlike what may be expected of the administrative operation of the United Nations that the Tribunal considers that it has the duty, if not to engage in a painstaking inquiry into everything that occurred, at least to examine the process leading to the non-renewal of the contract.

XVII. The Tribunal begins by recalling that it is true that a staff member who holds a fixed-term contract is not, in general, entitled to expect an extension; this is clear from staff rule 104.12 (b). The Administration has the discretionary authority not to renew or extend the contract and does not need to justify such decision. In that case, the contract expires automatically and without prior notice in accordance with staff rule 109.7 (see Judgements No. 440, *Shankar* (1989); No. 496, *M.B.* (1990); No. 1003, *Shasha'a* (2001); and, No. 1052, *Bonder* (2002)). However, as indicated in *Shasha'a (ibid.)*

> "when the Administration gives a justification for this exercise of discretion, the reason must be supported by the facts. (See Judgement No. 885, *Handelsman* (1998).) Under such circumstances, the exercise of discretion is examined not under the rule enunciated in Judgement No. 941, *Kiwanuka* (1999) but for consistency between the reason offered and the evidence".

XVIII. The Tribunal outlines below the context in which the events giving rise to this case took place which were set out in full detail by OIOS, even if the terms used seem euphemistic in regard to the incidents recounted. As stated in A/51/789:

> "The relationship between the Registry and the Office of the Prosecutor was often characterized by tension rather than cooperation".

The Applicant considers that he was taken hostage in the internal war that took place within ICTR. As he put it, "the Applicant, most unfortunately for him, became a pawn in the ongoing war between the Registry and the Office of the Prosecutor".

And in this internal war, anything was apparently permitted including, as previously indicated, defamation and the falsification of documents.

XIX. In that context, the Registrar, not only alleged poor performance by the Applicant but went further and fabricated evidence for his supposed shortcomings.

The Registrar stated to the Prosecutor that his decision was justified by the inadequate performance of the Applicant as is clear from the fax he sent on 17 September 1996 to which the JAB refers as follows in its report :

> "[T]he decision not to renew [the Appellant's] contract was made by me as Registrar. I was prepared to look into the matter again following your appeal. I have reviewed [the Appellant's] personnel file once again. [G]iven the track record of [the Appellant's] performance and general conduct as evaluated by his immediate supervisor ... [I have no] basis for changing the earlier decision".

But given the fact that there was no such poor performance and that the Prosecutor asked for objective reasons, the Applicant explained very clearly the process whereby a defamatory document, essential to an understanding of the process which led to the non-renewal of his contract, was put in his personnel file:

> "The Registrar took his decision months before he had someone insert in the Applicant's file the defamatory document prepared by [the Chief, Language Services] that he unsuccessfully tried to present as a PER.
>
> If, as the Panel and the Applicant agree, the defamatory document was not in the file at the moment the Registrar claimed to have taken his decision, then there was not anything against the Applicant in the file and the Registrar was not telling the truth in his memo of 17/09/96 ..., and, more importantly he had to have taken his decision *for extraneous factors* that to this day he has refused, or been unable, to give. A contrario, had the Registrar been telling the truth, then why has it always been impossible to know the grounds he claimed to have found twice in the Applicant's file?
>
> One of the explanations of the Registrar's actions can be found in the defamatory document prepared by [the Chief, Language Services]. The document bears the mention 'URGENT' and the date on it has been altered to show '*10 September, 1996*' ... The matter of the renewal of the Applicant's contract was raised by the Prosecutor, ... at a meeting she had with [the Registrar] in Arusha on *7 September, 1996*. In their meeting, [the Prosecutor] made [the Registrar] realize that her position was that 'This decision must ultimately be founded on the basis of the facts *reflected in the file*' and that she would not even discuss with [the Registrar] 'matter' he claimed to be 'of his personal knowledge', a position she later confirmed in the memo dated 18 September, 1996 ... [the Registrar] then realized that he had no choice but to 'deconstruct' urgently the Applicant's file. He gave orders to that effect and he asked ... to write the defamatory documents ... This is confirmed by the alteration of the date and by the addition of the word 'urgent' to that document. It had become 'urgent' to make the Applicant's file look

> already negative enough to back up the decision [the Registrar] had already announced two months earlier and that he was attempting to impose against all those concerned".

XX. However, the Tribunal considers it necessary to look closely at this defamatory document, which was also a forgery, prepared at the request of the Registrar and placed in the Applicant's file. The JAB condemned the attitude of the Registrar on this point and decided, in order to rectify such grave irregularity, to order the Administration to withdraw the document.

The Tribunal considers that the facts in the file confirm the analysis of the Applicant. The scenario was therefore as follows: since the Prosecutor wanted objective evidence if she were to agree to the non-renewal of the Applicant's contract, the Registrar, since he had no such facts in the file, had some prepared by the Chief, Language Services. The Applicant explained that it is beyond doubt that this document was fabricated a posteriori: the date had been changed and, moreover, "(t)hat this document was prepared after the fact is confirmed by its author in the last sentence of the document itself: 'these are [a] few of the facts which led the Registrar to decide ...'".

The Tribunal condemns such practices with the utmost firmness and considers that the Applicant must receive compensation for this violation of his due process rights. The Tribunal refers here to *Pearl* (Judgement No. 569, (1992), para. V), in which substantial damages were granted in respect of the utilization during a promotion procedure of a document that had not been transmitted to the Applicant and whose content was far more innocuous than that of the document prepared by the Chief, Language Services, in the present case:

> "The Tribunal is in accord with the view that the Applicant should have been made aware of and given an opportunity to comment in writing on the statement in the evaluation sheet that he 'might have a certain difficulty in maintaining harmonious relations with his colleagues in a high-stress managerial post when human-relations skills are of paramount importance'."

The Tribunal considers that the Applicant should be compensated for the serious professional, moral and material damage he suffered as a result of the malicious attitudes and arbitrary decisions of the Administration which gave rise to violations of his terms of service.

XXI. But that is not the only accusation concerning manipulation of the Applicant's file. There is the question of the forgery of documents unfavourable to the Applicant which he considers to have been put in his file in place of documents that were favourable to him, an issue which the Applicant criticizes the JAB for not having addressed: in particular, according to the Applicant, one item that was removed from his file was a report on an investigation carried out by two female judges clearing the Applicant of "accusations of racism and anti-feminism brought against the Applicant by an ICTR employee ... who had put in place a system of bribery and extortion from local employees which had been found out by the Applicant".

The Tribunal indicates its full agreement with what was said by the Applicant in his Application, namely that it is wrong to let pass without undue concern, as the JAB did, "the questions of the falsification and forgery of documents, extremely grave actions, especially when the guilty party is a United Nations Tribunal". The Tribunal therefore reaffirms its condemnation of such practices which are unworthy of the Administration of the United Nations.

XXII. The conclusion reached by the Tribunal is that the action by the Registrar must be regarded as null and void, having been taken not only *ultra vires*, but in a particularly arbitrary manner. The situation of the Applicant should therefore be restored to what it would have been, if the illegal action by the Registrar had not taken place. If the rules in force had been correctly applied and if the Registrar had not usurped his authority, it would have been for OHRM in New York to take the decision to renew or not to renew the Applicant's contract.

XXIII. There therefore remains the question whether the Applicant was deprived of a right or a legitimate expectancy of having his contract renewed, bearing in mind that he was only the holder of a one-year fixed term contract.

The Tribunal notes that it is apparent from the file that the Deputy Prosecutor, who should have made the recommendation to renew or not to renew, like the Prosecutor, and like the person in charge of his file in OHRM, indicated on several occasions that the Applicant should have his contract renewed. By way of example, the Tribunal quotes a fax of 6 September 1996 from the Deputy Prosecutor expressing his wishes by stating: "I insist that [the Applicant's]

contract be extended" as well as a fax of 18 September 1996 from OHRM to ICTR in which OHRM also insisted on the renewal of the contract:

> "We have received a copy of the performance evaluation report prepared by the office of the Deputy Prosecutor in relation to [the Applicant's] service with the Tribunal since 28 September 1995. In view of the staff member's fully satisfactory service during the past twelve months as evidenced by the official evaluation report prepared in accordance with established procedures, OHRM is of the view that [the Applicant] should be given an opportunity to continue serving the organization. This is ever more important on account of the Tribunal's continuing need for experienced translators at this important juncture in its programme of activities.
>
> Under the circumstances, it would appear appropriate to extend the staff member's appointment for a period of three to six months".

Furthermore, on 18 September 1996, the new Prosecutor expressed the same view by indicating that he also "support[ed] the desire of the Deputy Prosecutor to have [the Applicant's] contract renewed on the basis of the assessment of the value of [the Applicant's] work".

The Tribunal can only endorse the observations made on the same day on the basis of these documents contained in a message from the Applicant to the Registrar:

> "I am informed by the direction of OHRM in New York that it goes clearly against the established procedures of [the United Nations] not to renew a contract when the need exists, the post exists, the funds are allocated and the Performance Evaluation Report of the employee is very good. Even more so when, as is now the case, the supervisor and the superiors indicate that they wish the contract to be renewed".

It is therefore clear that if the authority in charge had been able to exercise its authority, which was usurped by the Registrar, the Applicant would have had his contract renewed, although the Tribunal cannot determine with certainty what the duration of such renewal would have been.

XXIV. The conclusion reached by the Tribunal that the Applicant's contract would certainly have been renewed, had it not been for the illegal action by the Registrar is further reinforced by the fact that his performance evaluation report was amended as a result of his challenge and that it was in fact even better than the one that OHRM had taken as a basis for trying to resist the actions of the Registrar and calling for the renewal of the Applicant's contract.

XXV. It now remains for the Tribunal to consider the pleas of the Applicant that were not considered by the JAB.

XXVI. An initial request by the Applicant was for his entry on duty date to be corrected, something that was never done in spite of numerous requests. The dispute focuses on the date of the start of his contract which he claimed to be 25 September 1995. The facts in the file are very clear in the sense that the letter of appointment actually specified the date of 28 September 1995, a date on which the Administration insists, but there is a great deal of evidence that this was a mistake that the Administration should have corrected, to say nothing of disturbing facts such as dates referring to 28 September which have clearly been corrected in various documents using Typex! The main item which has convinced the Tribunal that the Applicant began to work on 25 September 1995 is a letter sent on 28 March 1996 to OHRM by the Head of Personnel, ICTR, which states as follows:

> "... [the Applicant] took up his duties with the Tribunal on 25 September 1996. You are kindly requested to amend [the Applicant's] Letter of Appointment and P.5 form accordingly".

The Tribunal finds in the file sufficient clear and probative evidence to set aside the date mentioned in the Applicant's contract of employment, a date which seems never to have been corrected, and therefore accepts that plea by the Applicant.

XXVII. A second plea by the Applicant is for him to be granted an "extended installation grant on the same basis used for other ICTR employees in a similar situation at the same time at Kigali".

Without wishing unnecessarily to overburden this very long judgement by unduly technical arguments, the Tribunal will merely say that it emerges both from the items in the file, which have been scrupulously examined, and from the logic underlying the grant of an extended installation grant, that the Administration had no valid reason to refuse to reimburse the Applicant, and the Tribunal therefore accepts his plea.

XXVIII. A third plea by the Applicant is that he should be paid for "some home leave according to the [United Nations] rules as applied to [United Nations] employees in Kigali in 1995-1996". The Tribunal recalls that at the outset there was a certain amount of uncertainty as to the application to staff of ICTR at Kigali of the United Nations Staff Regulations, but it is no longer disputed that those Regulations were applicable to ICTR staff, as indicated by OIOS in A/51/789:

> "... both the Office of Legal Affairs and the Department of Administration and Management acknowledged that the financial rules, *the personnel rules* and the other administrative issuances of the United Nations apply to the Tribunal personnel and functions" (emphasis added by the Tribunal).
>
> The Tribunal therefore considers that the Applicant was entitled to home leave.

XXIX. A fourth plea by the Applicant concerns his challenge to the level at which he was recruited. The Tribunal has found in the Applicant's file an abundant correspondence on this question which the Applicant raised as soon as he arrived, indicating in particular that, in his view, the error was due to the confusion of his file with that of another staff member.

> "What convinced the Applicant that there has been a mix-up of files was ... the medical examination instructions where the Applicant, who was then in *Canada*, was directed in writing by the recruitment officer to go to *Nepal* for his medical examination" (emphasis added by the Applicant).

The Tribunal can only note that this indicates a degree of muddle in administrative procedures but that does not necessarily mean that the Applicant was deprived of the right to be classified at a level higher than the one indicated in his contract. The Applicant frequently approached the Administration to seek a different classification but - even though the answers took a long time to arrive - the Administration clearly refused to entertain his request and to correct what the Applicant regarded as a mistake. On the subject of the classification of staff members at one level rather than at another, the Tribunal has always stated that it leaves the Secretary-General a certain freedom of action but verifies that there has been no abuse in the exercise of discretion (see Judgement No. 134, *Furst* (1969); and, Judgement No. 879, *Choudury and Ramchandari* (1998)). The Tribunal does not find in the file any evidence indicating that the refusal to change the level at

which the Applicant was recruited was arbitrary and it therefore rejects that plea by the Applicant.

XXX. For all of the forgoing reasons, the Tribunal:

1. Declares that the decision not to renew the Applicant's contract shall be considered as null and void, having been taken by an authority without competence to do so and acting, moreover, in a particularly arbitrary fashion;

2. Observes, that the reinstatement of the Applicant would not be practical in view of the circumstances;

3. Declares that the Applicant was deprived of his legitimate expectancy of having his contract renewed and orders the Administration to pay the Applicant, by way of compensation, two years net base salary, allowances and other entitlements at the rate in effect at the time of the judgement;

4. Orders the Administration to pay the Applicant for his days of work from 25 to 27 September 1995, inclusive;

5. Orders the Administration to pay the Applicant an extended installation grant under the same conditions as those applicable to the other staff of ICTR during the same period;

6. Orders the Administration to give the Applicant the leave to which he was entitled under the United Nations rules applicable to United Nations employees at Kigali at the same period;

7. Orders the payment to the Applicant of $5,000 as compensation for the insertion of a defamatory document in his file, and the dissemination of its content by means of the report of the Joint Appeals Board, to say nothing of its being retained in the Applicant's personnel file;

8. Orders that all defamatory and forged documents that may be in the Applicant's personnel file be withdrawn and that all favourable items that had been removed from the file be returned to it, and orders the Administration to send written confirmation

to the Applicant that it has carried out that task, giving a specific list of the documents concerned, within six months;

9. Rejects all other pleas.

(*Signatures*)

Mayer Gabay
Vice-President, presiding

Omer Yousif Bireedo
Member

Brigitte Stern
Member

Geneva, 25 July 2003

Maritza Struyvenberg
Executive Secretary

United Nations AT/DEC/1136

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1136

Case No. 1217: SABET & SKELDON Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, Vice-President, presiding; Mr. Omer Yousif Bireedo; Ms. Brigitte Stern;

Whereas, at the request of Mary Sabet and Grania Skeldon, staff member and former staff member respectively of the Economic and Social Commission for Asia and the Pacific, hereinafter referred to as ESCAP, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit in which to file an application until 30 September 2001;

Whereas on 27 September 2001, the Applicants filed an application in which they requested the Tribunal:

"1. ...

(a) [To find] that by failing for more than 16 years to carry out the complete classification procedure in respect of two posts in the Editorial Services, ESCAP, the Administration had contravened the mandate of the General Assembly and the applicable Staff Regulations of the United Nations ...

(b) [To find] that by failing to make appropriate provision to implement the official classification levels approved by the Classification Section of the Office of Personnel Services [now Office of Human Resources Management], the Administration had denied the Applicants the protection of their conditions of service;

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(c) [To find] that by disregarding the unanimous recommendation of the Joint Appeals Board, the Administration ... had further denied the Applicants due process.

2. ...

(a) [To order] that the Applicants be promoted retroactively from the dates when they had completed the minimum required periods of service in grade, as if the posts they were encumbering had been regularly classified from the beginning, and that they be granted appropriate steps of seniority ...

(b) [To order] that the Administration compensate the Applicants with the difference in net base salary between what they actually received and what they would have received if they had been promoted on the dates indicated above, including the actuarial equivalent of loss in pension and other ancillary benefits ...

(c) [To order] that in addition to the three months compensation approved by the Secretary-General for the delay ..., the Applicants should be awarded compensation in the amount of two years net base salary ..."

Whereas at the request of the Respondent, the President of the Tribunal extended the time-limit for the Respondent to file his answer until 31 January 2002 and then 31 March 2002;

Whereas the Respondent filed his answer on 12 March 2002;

Whereas the Applicants submitted written observations on 15 April 2002;

Whereas the facts in Applicant Sabet's case are as follows:

Applicant Sabet entered the service of the Organization on 7 February 1983, on a fixed-term appointment of two months and 20 days as editor at the P-3 level with the Conference Services Section, Economic Commission for Western Asia (ECWA), in Iraq. At the time of the facts which gave rise to the present application she occupied the post of Chief, Editorial Services Section (ESS) at ESCAP in Bangkok and had a permanent contract.

In June 1982, the ESCAP Administration submitted a request for classification of the post of Chief of Editorial Services at ESCAP, which was then at the P-4 level. On 24 May 1983, the Assistant Secretary-General, Office of Personnel Services, approved the classification of that post at the P-5 level. ESCAP submitted requests for the budgetary reclassification of the two posts in question in every biennium budget from 1986-1987 until 2000-2001, save the biennium 1998-1999. On 1 March 1991, the Applicant was promoted to the P-4 level against the post of Chief, Editorial Services, which was still at the P-4 level in the budget.

Between 28 November 1996 and 15 September 1997, the Applicant wrote several times to the Executive Secretary of ESCAP and to the Chief, Division of Administration, ESCAP, drawing their attention to the "lack of congruence since 1983 between the classified and budgetary levels of [her post and that of Applicant Skeldon] in the Editorial Services Section" and pointing out that "financial considerations or the prospect of negative action by the General Assembly do not constitute sufficient justification for refusing to implement a classification decision" requesting that the reclassification be given retroactively with effect from 1 March 1991.

On 27 October 1997, the Applicant wrote to the Secretary-General requesting a review of the administrative decision not to implement the classification decision in respect of her post.

On 9 January 1998, the Applicant filed a statement of appeal with the Joint Appeals Board.

Following the request for budgetary reclassification of the post submitted in the biennium 2000-2001, the post of Chief, ESS, at ESCAP was included at the P-5 level in the programme budget for the biennium 2000-2001. On 1 April 2000, the Applicant was promoted to the P-5 level. She also received a special post allowance for the period from 1 January to 30 April 2000.

Whereas the facts in Applicant Skeldon's case are as follows:

The Applicant entered the service of the Organization on 7 September 1967, on a four-month fixed-term contract at the P-2 level, as English editor in the Office of Conference Services, at Headquarters. Her service was interrupted from 1973 to 1980 and from 1982 to 1995. At the time of the facts that gave rise to the present application, she had a fixed-term appointment at the P-3 level as English editor in the Editorial Services Section at ESCAP.

In November 1983, the ESCAP Administration submitted a request for classification of the post of Editor, ESS/ESCAP, which was then at the P-3 level. On 29 November 1983, the Assistant Secretary-General, Office of Personnel Services, approved the classification of the post of Editor at the P-4 level. ESCAP submitted requests for the budgetary reclassification of the two posts in question in every biennium budget from 1986-1987 until 2000-2001, save the biennium 1998-1999.

Following her second interruption of service, the Applicant re-entered the service of ESCAP on 1 December 1995, as Editor at the P-3 level. Between 29 November 1996 and 15 September 1997, she wrote several times to the Executive Secretary of ESCAP and the Chief, Division of Administration, ESCAP, requesting that the funds necessary for effective implementation of the reclassification of her post be released and that the emoluments she was owed since she took up the functions of the post be paid in full.

On 30 October 1997, the Applicant filed a statement of appeal with the Joint Appeals Board.

Following the request for budgetary reclassification of the post submitted in the biennium 2000-2001, a P-4 post was transferred to ESS/ESCAP. On 1 April 2000, the Applicant was promoted to the P-4 level against that post. She also received a special post allowance for the period from 1 January to 30 April 2000.

The Joint Appeals Board adopted its report on the two cases on 19 December 2000. Its findings and recommendations included the following:

"**Considerations**

...

30. As the two appeals were identical in substance, the Panel decided to consolidate them and deal with them in a single report.

...

32. The basic facts of the present case were not in dispute ...

33. However, it was not clear as to why it took approximately 14 years, from the time when the two posts were confirmed at their reclassified levels, for the budgetary reclassification of those posts to be approved. ... It should be noted that PPBD had rejected not just one, but six biennium requests from ESCAP to reclassify the Appellants' posts. In the view of the Panel, the Respondent's reply was far from adequate. ...

34. The Panel also observed that during those 14 years at least four posts within ESCAP had been successfully reclassified through either redeployment of posts within ESCAP (three cases) or regular budget process (one case). ... Those cases, which the Respondent did not deny, it was felt, considerably weakened the Respondent's main argument that financial constraints had prevented the two posts from being budgetarily reclassified.

35. In the opinion of the Panel, even if financial constraints had been the principal factor, 14 years of delay were still too long and too unfair to the staff members directly concerned. Such a lengthy delay in budgetarily reclassifying those posts deprived the staff members of the protection of the conditions of service ...

36. As a result of the continuing failure of the Administration to provide for the reclassification of their posts, the Appellants were performing at the clearly higher level functions for approximately nine years in Ms. Sabet's case and approximately four and a half years in Ms. Skeldon's case, without adequate recognition or commensurate compensation. It created a totally inequitable situation for the Appellants. Moreover, it violated the principle of 'equal pay for equal work'.

37. In light of the foregoing, the Panel *unanimously recommends* that the Appellants be promoted to the P-5 and P-4 levels respectively after they completed the minimum required periods of services in grade, as if the two posts had been regularly reclassified from the beginning, [and that their seniority be adjusted accordingly].

...

40. The Panel noted the Appellants' other damage claims for the delay in processing their inquiries and their appeals, but felt uncomfortable, in the absence of guideline, to suggest the reward as requested. It was not sure if the said delay had caused actual injury to the Appellants' rights as staff members. However, this did not mean that, in not recommending other monetary compensation the Panel felt any less strongly about the nature of the grievances and the seriousness of the breach of the Appellants' conditions of service.

..."

On 10 July 2001, under cover of separate letters, the Under-Secretary-General for Management transmitted to the Applicants copies of the JAB report and advised them as follows:

"The Secretary-General considers that, even if a [P-5 post for Ms. Sabet, P-4 post for Ms. Skeldon] had been included earlier in the programme budget and the General Assembly's approval for such a post had been obtained, it does not necessarily follow that you would have been automatically promoted to that post. In accordance with the Tribunal's jurisprudence, the classification of a particular post is altogether different from the promotion of its incumbent, whose promotion to the higher level depends on the outcome of the regular review process.

"In considering the Board's recommendation that you should be compensated for the higher-level functions you performed, the Secretary-General observes that the decision to compensate staff for performing higher-level functions is discretionary and subject to the availability of a post. In the absence of an available post in this case, there is no abuse of discretion in deciding not to pay such compensation. Moreover, paragraph 10 of administrative instruction ST/AI/277 [dated 10 November 1980] on 'Classification System for Professional Posts', which is applicable to this case, provides that, in the context of an upward post reclassification, a staff member will be placed on that post at the previous, lower grade 'until the new grade is approved through the budget submission to the General Assembly'.

> "In light of the above considerations, the Secretary-General cannot accept the Board's recommendation for compensation. However, taking into account the totality of circumstances in this case, the Secretary-General agrees with the Board that the Administration was obligated to find a timely solution to the discrepancy between the level of the functions and the budgetary level of the post. Acknowledging the delay in resolving your case, he has decided that you should be compensated in the amount of three months net base salary."

On 27 September 2001, the Applicants filed with the Tribunal the application mentioned above.

Whereas the Applicants' principal contentions are:

1. The Secretary-General's decision to reject the unanimous recommendation of the Joint Appeals Board demonstrated indifference to the facts and a blatant disregard for the established appeals mechanism.

2. By choosing not to exercise his discretionary power to make provision for timely implementation of the official classification levels of the Applicants' posts through regular budgetary or other means, as he had done for other ESCAP posts, the Respondent had acted in an arbitrary and inequitable manner and had violated the principle of "equal pay for equal work".

3. The Administration's position contravened the mandate given by the General Assembly and the principles underlying the introduction of a system of classification in the Organization.

4. The Administration had acknowledged the delay in resolving the Applicants' cases but the compensation granted was not sufficient to repair the financial and personal losses the Applicants had suffered.

Whereas the Respondent's main arguments are:

1. The Applicants had no right to promotion, a fortiori to retroactive promotion. The reclassification of a post does not create any right or expectancy of promotion.

2. Had the posts been funded in 1983, the Applicants may not have been eligible for those posts. Even if additional funds had been budgeted subsequent to the Applicants' incumbency, the Applicants would have been subject to a regular promotion review process, the outcome of which could not be anticipated with certainty.

3. The inability to provide budgetary support for the Applicants' posts was not improperly motivated.

4. The award of compensation at a higher level is discretionary and the Applicants had no right to such compensation.

The Tribunal, having deliberated from 1 to 25 July 2003, now pronounces the following judgement:

I. The pattern of behaviour of the Administration with respect to the two Applicants whose cases are joined is similar and the two applications allege the same malfunctions of the post classification procedure in ESCAP.

An exercise for the classification of the post of Chief, ESS/ESCAP, which was then at the P-4 level and was encumbered, at the time of the events giving rise to this application, by the Applicant Sabet, began in June 1982 and resulted in the classification of the post at the P-5 level, which was approved by the Administration on 24 May 1983. The classification was confirmed in 1986.

Similarly, an exercise for the classification of the post of Editor, ESS/ESCAP, which was then at the P-3 level and was encumbered, at the time of the events giving rise to this application, by the Applicant Skeldon, began in November 1983 and resulted in the classification of the post at the P-4 level, which was approved by the Administration on 29 November 1983. This classification was also confirmed in 1986.

ESCAP requested funds in order to classify the two posts in question at the levels that had been determined in all the biennium budgets, beginning with the 1986-1987 budget, and repeating the request at the time of preparation of each budget up to that of 2000-2001, except for the 1989-1999 budget.

II. The Tribunal, before analysing the facts of this case, wishes to reaffirm that the classification of posts and the promotion of the incumbents of the posts are two different things, even though they are interdependent, and that these two operations must comply with the principles stated in the Staff Regulations, regulation 2.1 of which provides:

> "In conformity with principles laid down by the General Assembly, the Secretary-General shall make appropriate provision for the classification of posts and staff according to the nature of the duties and responsibilities required."

The role of the Tribunal is to verify that the Administration does not violate the conditions of service of the members of the staff of the United Nations, and the scope of such verification varies depending on the Secretary-General's freedom of action.

III. On the subject of the classification of posts, the Tribunal recalls, as it did in *Moser* (Judgement No. 388 (1987), para. XIV) that the classification of the posts of staff members is part of their conditions of service.

The Tribunal also recalls, in connection with the implementation of the prerogatives of the Secretary-General, what it affirmed in its Judgement No. 541, *Ibarria* (1991), which was based on Judgement No. 396, *Waldegrave* (1987), namely that it cannot substitute its own judgement for that of the Secretary-General in post classification matters. What the Tribunal must do is merely to consider whether there has been a material error in procedure or substance or some other significant flaw in the decision complained of (see *Ibarria*, ibid.). In fact, the issue here is not a challenge to a classification but merely an application claiming that a classification that was made was not implemented in accordance with the rules in force. It is clearly part of the Tribunal's terms of reference to ensure that classification procedures are respected.

IV. On the question of the promotion of staff members, the Tribunal has similarly taken the view that the rules and procedures concerning promotions are part of the conditions of service of staff members. This was stated with particular clarity in *Bentaleb* (Judgement No. 539 (1991), para. II):

> "While recognizing the principle that promotions are subject to the discretion of the Secretary-General, the Tribunal has also considered that the rules and procedures regulating the promotion process contain safeguards to ensure fairness and objectivity in a process which is vital to staff members. Accordingly, the Tribunal has stressed that these rules and procedures are part of the conditions of service of staff members and should therefore be respected, correctly interpreted and properly applied."

With respect to the scope of its review of the promotion process, the Tribunal has consistently stated that it leaves a degree of freedom of action to the Secretary-General but verifies that there has been no abuse in the exercise of discretionary authority (Judgements No. 1031, *Klein* (2001); and No. 1056, *Katz* (2002)). Thus, the Tribunal has frequently acknowledged that a staff member of the United Nations has no automatic right to be promoted after a certain number of years and that it cannot substitute its own judgement for that of the Administration with respect to the standards of performance or efficiency of a staff member; however, it has just as often considered that officials had been arbitrarily deprived of their right to be considered for promotion and even, in certain specific cases, that they had a real legal expectancy of promotion which had been infringed. Thus, in *Kumar* (Judgement No. 470 (1989), para. IV) the Tribunal stated that:

> "... it cannot substitute its judgement for that of the Administration concerning the standard of performance or efficiency of a staff member. However, the Tribunal is competent to pass judgement upon applications alleging non-observance of pertinent regulations and rules or alleging prejudice or improper motivation."

V. The Tribunal will therefore consider in succession in the light of the general principles under which it exercise its power of review — which have just been summarized above — the manner in which the classification of the posts was carried out and the way in which the promotion of the two Applicants was handled, without confusing these two issues.

VI. This, however, is what the Respondent is seeking to do. The first argument of the Respondent in the case is that "[t]he applicants had no right to promotion, a fortiori to retroactive promotion. The reclassification of a post does not create any right or expectancy of promotion". But in putting forward this argument from the very outset of the legal arguments submitted in the answer, the Administration confuses two issues between which the Tribunal has already had occasion to make a clear distinction, which it is therefore bound to repeat (see Judgement No. 388, *Moser* (1987), para. I):

> "The Respondent argues that staff members in General Service posts have no such right, inter alia, relying heavily on the notion that in seeking reclassification, the Applicant was, in reality, demanding a promotion and that since no staff member has a right to a promotion, the Applicant had no right to reclassification.

> "The Tribunal holds in this respect that the classification of a particular post is altogether different from the promotion of its incumbent. The classification of each post depends on the nature of the duties and responsibilities assigned to it and not on the personal qualifications, experience or performance of the incumbent. Therefore, posts should be classified according to their respective job descriptions, which must be presumed to set forth accurately the nature of the duties and responsibilities of the job. Classification refers to the task to be performed by the incumbent of a given post; promotion is, in principle, connected to the way that task is performed, and takes into consideration performance evaluation reports.
>
> "As a consequence, the non-existence of a right to promotion for staff members is irrelevant as far as post classification is concerned."

VII. The Tribunal will therefore begin by considering the way in which the Administration proceeded in order to give effect to the classification decisions adopted in 1983, confirmed in 1986 and implemented only in 2001, 18 years later.

VIII. The two Applicants maintain that "the non-implementation of the budgetary classification of the two posts was a breach of the United Nations own policy and principles as well as the principle of equal pay for equal work". The Respondent for his part, states in the answer, by way of justification for the failure to finalize the classification process, that it had not been possible to obtain the necessary funds:

> "Additional budgeting has been requested for the Applicants' posts, but had not been granted ... ESCAP made consistent efforts to obtain such budgetary support, but was unsuccessful ... The decision not to supply such budgetary support was a financial decision taken by the Organization, in the light of financial constraints facing the Organization at the time, and more particularly those facing ESCAP."

IX. The Tribunal considers, in the first place, that the Administration is wrong in claiming that it made the necessary efforts in good faith to secure budgeting for the reclassified posts and fully shares the analysis of the Joint Appeals Board to the effect that no reasonable explanation was given for the 14 years' delay in implementing the classification, a calculation which was, moreover, made by the Board from the date of confirmation of the classification and not from the initial classification:

> "However, it was not clear as to why it took approximately 14 years, from the time when the two posts were confirmed at their reclassified levels, for the budgetary reclassification of those posts to be approved. The Respondent in [his] Reply stated that PPBD had decided not to include the requests for reclassification of the two posts in the Secretary-General's budget proposals.

> However, [he] did not give reasons for the PPBD's rejections. It should be noted that PPBD had rejected not just one, but six biennium requests from ESCAP to reclassify the Appellants' posts. In the view of the Panel, the Respondent's reply was far from adequate. The Panel believed that the staff members concerned and the Panel were owed an explanation as to why the reclassification requests for those two posts had been repeatedly rejected. It believed that 14 years were too long. It was disheartened by the lack of any response to the Appellants' inquiries. During its deliberations, the Panel gave the Respondent another opportunity for clarification, but did not think that the information provided by the Respondent shed much light on that issue."

Similarly, the Tribunal has received no satisfactory additional explanations for the failure to implement the budgetary reclassification.

X. Moreover, it considers that the conduct of the Administration was all the more arbitrary in that other posts were classified during the period concerned, as also noted by the Joint Appeals Board:

> "The Panel also observed that during those 14 years at least four posts within ESCAP had been successfully reclassified through either redeployment of posts within ESCAP (three cases) or regular budget process (one case) ... Those cases, which the Respondent did not deny, it was felt, considerably weakened the Respondent's main argument that financial constraints had prevented the two posts from being budgetarily reclassified. If it had indeed been plagued by financial woes, the Administration would not have been in a position to implement any classification within ESCAP during the relevant period."

XI. However, even assuming that the Administration had made the necessary efforts, merely to tell the Applicants: "We cannot remunerate your work respectively at the P-5 and P-4 levels because we only have enough money to pay you respectively at the P-4 and P-3 levels" is incompatible with the principle of equal pay for equal work.

Since the Administration alleged budgetary reasons which it regarded as justification for its failure to implement the budgetary classification of the Applicants year after year, the Tribunal wishes to point out that budgetary arguments cannot systematically be considered as an excuse for not granting officials the rights to which they are entitled. In Judgement No. 857, *Daly & Opperman* (1997), paragraphs III and V, the Tribunal clearly indicated the limits of the discretionary authority of the Administration in giving effect to the classification of posts:

> "The Respondent argues that a recommendation by the CCS [Compensation and Classification Service] that a post be upgraded is not a sufficient condition for its reclassification even when a post at a higher level is available. The appropriate resources must be available before the post is reclassified, pursuant to a classification notice by the CCS. The Tribunal cannot accept this contention. The lack of budgetary funds as a justification for non-implementation of the classification of the Applicants' posts is not acceptable in the light of the special circumstances of this case ...
>
> "...
>
> "The Tribunal must decide whether the Applicants were accorded due process in the determination of their case and whether it is within the Secretary-General's discretion to refuse the Applicants equal pay for equal work and responsibilities at the G-7 level, which the Administration recognized as their appropriate level. The Tribunal believes that while the Secretary-General's discretion is not limited, it must be exercised on a non-discriminatory and non-arbitrary basis. In invoking the budgetary argument as a reason for failing to implement the classification of the Applicants' posts, while implementing the upgrading of 28 other posts, the Administration behaved in an arbitrary manner."

XII. The Tribunal will consider the argument of the Respondent who regards this precedent as irrelevant stating, without the least explanation, that "the situation in the present case is not comparable". For its part, the Tribunal fully agrees on this point with the Joint Appeals Board which took the view that, on the contrary, the precedent was fully applicable to this case:

> "In the opinion of the Panel, even if financial constraints had been the principal factor, 14 years of delay were still too long and too unfair to the staff members directly concerned. Such a lengthy delay in budgetarily reclassifying those posts deprived the staff members of the protection of the conditions of service. The Panel felt that the present case was similar to *Daly & Opperman*, in the sense that certain posts were classified and other posts were not classified during the same period of time. It also felt that the conclusions reached by the Administrative Tribunal in *Daly & Opperman* were dispositive of the present case."

In the view of the Tribunal it is, indeed, fully applicable to this case as clearly emerges from the terms it used in *Daly & Opperman*, paragraph III:

> "The Respondent argues that a recommendation by the CCS [Compensation and Classification Service] that a post be upgraded is not a sufficient condition for its reclassification even when a post at a higher level is available. The appropriate resources must be available before the post is reclassified, pursuant to a classification notice by the CCS. The Tribunal cannot accept this contention. The lack of budgetary funds as a justification for non-implementation of the classification of the Applicants' posts is not acceptable

> in the light of the special circumstances of this case. The budgetary provisions for upgrading these posts from the G-6 to the G-7 level involved an insignificant sum of money when viewed against the total biennial programme budget of the United Nations Secretariat."

In *Daly & Opperman*, it was a question of the reclassification of two posts, just as in the present case it is a question of the classification of only two posts, which, in the context of the United Nations budget, is insignificant. The Applicants moreover emphasize the modest financial implications of the reclassification.

The Tribunal wishes to reaffirm that **the budgetary argument cannot nullify a classification decision within a reasonable time frame** as also indicated by the Tribunal in *Daly & Opperman*, paragraph IV:

> "The Tribunal agrees with the Applicants' submission that once the special mechanism to remove the anomalies found in the DHL [Dag Hammarskjöld Library] was put into place, as mandated by the General Assembly, **the Secretary-General was under a legal obligation to implement the CCS [Compensation and Classification Service] decision without undue delay**" (emphasis added by the Tribunal).

The purpose of the ESCAP classification exercise, like that of the United Nations library, was to put an end to anomalies resulting from the classification of posts at the wrong level, and the situation is therefore comparable on all counts. In not carrying through the classification to its conclusion, the Administration failed to fulfil the obligations that are incumbent on the Secretary-General under the resolutions of the United Nations, particularly resolution 35/214 of 17 August 1980:

> "*The General Assembly,*
>
> "...
>
> "*Invites* the Commission, the Secretary-General and the heads of the organizations which have accepted the Commission's statute to cooperate fully in the implementation of the common standards of job classification established by the Commission, ensuring appropriate consideration of the individual situation and requirements of each organization and the most economical use of resources."

XIII. In concluding its consideration of the classification procedure, the Tribunal must therefore decide in this case whether the two Applicants were accorded due process in the determination of their case and whether it was within the Secretary-General's discretion to refuse to classify their posts at P-5 and P-4, respectively, which the Administration had long recognized as being the level to which they were

entitled. The Tribunal considers that to allege budgetary reasons in order not to implement the classification of a post, implies replacing the principle set forth in regulation 2.1 of the Staff Regulations by the principle that the duties of staff members should be carried out at the lowest possible cost. The Tribunal considers that by invoking the budgetary argument in order not to give effect to the classification of the posts of the two Applicants for 16 years, the Administration behaved in an arbitrary manner.

XIV. The Tribunal will next consider the failure to promote the two Applicants for the whole of that period. They both consider that they did not receive the promotions they were entitled to expect because the process of classifying their posts had not been finalized. The Respondent, for his part, maintains that, even if the posts had been correctly classified, that would not have changed the situation of the Applicants:

> "Even if additional funds had been budgeted subsequent to the Applicants' incumbency, the Applicants would have been subject to a regular promotion review process, the outcome of which could not be anticipated with certainty."

XV. The Tribunal will first consider the way in which the Administration treated the two Applicants following their innumerable letters, claims and appeals. The Tribunal notes that the situation of the Applicants changed somewhat following the decision of the Joint Appeals Board adopted on 5 February 2001. On the one hand, on 25 June 2001, the Secretary-General informed the Applicants that he was granting them a special post allowance for four months from 1 January 2000 to 30 April 2000 as compensation for the fact that prior to 1 May 2000 the Applicants had been performing duties corresponding, respectively, to a P-5 and a P-4 post, although they were paid, respectively, at grades P-4 and P-3. Thus, the Administration granted the Applicants a three-month salary differential even though it had benefited from their work at a level higher than that of their remuneration for 49 months (from 1 March 1996 to 1 January 2000) in the case of the Applicant Sabet, and for 13 months in the case of the Applicant Skeldon (from 1 December 1998 to 1 January 2000).

Furthermore, the Secretary-General informed the two Applicants in separate letters dated 10 July 2000 that he did not accept the decisions of the Joint Appeals

Board but would grant them three months' salary by way of compensation for the four years' delay while their cases were being dealt with:

> "In light of the above considerations, the Secretary-General cannot accept the Board's recommendation for compensation. However, taking into account the totality of circumstances in this case, **the Secretary-General agrees with the Board that the Administration was obligated to find a timely solution to the discrepancy between the level of the functions and the budgetary level of the post**. Acknowledging the delay in resolving your case, he has decided that you should be compensated in the amount of three months net base salary" (emphasis added by the Tribunal).

The Tribunal does not consider this meagre pittance to be fair compensation for the manner in which the two Applicants were treated over a period of several years.

XVI. The Tribunal will next turn to the promotion process which took place or, to put it more accurately, the process of non-promotion which occurred. The Tribunal has always maintained that there is no automatic promotion from one grade to another, but it nonetheless remains true that the increasingly frequent and systematic attitude of the Administration, which classifies a post at the level corresponding to the duties and responsibilities the post entails and which then, for years, and even for almost two decades as in the present case, does not implement its own classification for budgetary reasons and makes that an excuse to refuse promotion, is not acceptable since it strikes at the right of every staff member to career development in accordance with his or her rights and responsibilities.

There is, on the one hand, the "virtual classification", which corresponds to the work performed by the incumbent of the post, and on the other hand, the "actual classification", which is lower and corresponds to the salary paid to the incumbent of the post. This discrepancy, when it is of limited duration, is frequently corrected by a special post allowance as provided in staff rule 103.11:

> "(a) Staff members shall be expected to assume temporarily, as a normal part of their customary work and without extra compensation, the duties and responsibilities of higher level posts.
>
> "(b) Without prejudice to the principle that promotion under staff rule 104.14 shall be the normal means of recognizing increased responsibilities and demonstrated ability, a staff member who is called upon to assume the full duties and responsibilities of a post at a clearly recognizable higher level than his or her own for a temporary period exceeding three months may, in

exceptional cases, be granted a non-pensionable special post allowance from the beginning of the fourth month of service at the higher level."

It is clear from this text that the Staff Rules regard it as an exceptional and temporary situation for a staff member to assume the duties of a higher post than his or her own and that such an arrangement cannot become a standard part of the conditions of service.

XVII. Having stated these general principles, the Tribunal will review the two instant cases. The Tribunal recalls first that officials are supposed to be eligible for promotion after a certain period of time. In circular ST/IC/1993/66 of 2 December 1993 concerning promotions, the following criteria were set out for promotion from one category to another:

"The established requirement of minimum seniority in grade for staff in the Professional category and above is as follows:

P-1 to P-2 — Two years

P-2 to P-3 — Three years

P-3 to P-4 — Three years

P-4 to P-5 — Five years

P-5 to D-1 — Five years."

The Applicant Sabet, who was at the P-4 level from 1 March 1991, would therefore have been eligible for consideration for promotion to the P-5 level with effect from 1 March 1996, and the Tribunal considers that she effectively lost her chance of being so considered. Of course, if her career had developed with a promotion to the P-5 level on 1 March 1996 she would have been eligible to be considered for promotion. The situation in which she finds herself at the present time bears little relation to that as she has been at the P-5 level since May 2000, currently with only three years seniority.

Similarly, the Applicant Skeldon, who was at the P-3 level from 1 December 1995, would therefore have been eligible for consideration for promotion to the P-4 level with effect from 1 December 1998, and the Tribunal considers that she effectively lost her chance being so considered. Of course, if her career had developed with a promotion to the P-4 level on 1 December 1998 she would have been eligible to be considered for promotion to the P-5 level with effect from 1 December 2003. The situation in which she finds herself at the present time bears little relation to that as she took early retirement at the P-4 level.

The Administration has never disputed the fact that the two Applicants were performing duties corresponding to their post descriptions. Moreover, it appears from a study of their personnel files, and this fact too has never been contested by the Administration, that both Applicants were excellent staff members of the United Nations and gave full satisfaction in the editing service in which they worked. It is not disputed that the Applicant Sabet, during the period under consideration, was rated as "Excellent" and that the evaluation of the Applicant Skeldon stated that she "(c)onsistently exceeds performance expectations".

There was therefore no justification for the non-promotion of the two Applicants other than the laxity of the Administration in dealing with the classification of their posts. The Tribunal sees proof of this in the fact that, as soon as the classification of their posts was finalized on 1 May 2000, they were both promoted immediately. Moreover, the Administration paid them a special post allowance with effect from 1 January 2000 which is equivalent financially to predating their promotion by four months.

The Tribunal considers that by not promoting the two Applicants as they were entitled to expect, the Administration violated the principle of equality of treatment of staff members with identical duties and responsibilities.

XVIII. Furthermore, the Tribunal notes that not only were the careers of the Applicants subjected to incomprehensible delays, but also that the same applied in the handling of the claims for more satisfactory career development. The Tribunal thus considered the administrative appeals procedure. The Applicants initiated the appeals procedure before the Joint Appeals Board in 1997: the Board, however, only took its decision on 5 February 2001, in other words four years later. In addition, the Applicants had to demand the transmission of the report of the Joint Appeals Board as it was not forwarded to them in timely fashion.

XIX. The Tribunal strongly condemns this accumulation of delays in the present case. It recalls that a significant delay is in itself an infringement of the conditions of service of United Nations officials as it already stated in *MacMillan-Nihlén* (Judgement No. 880 (1998), para. VI):

> "The Applicant does not have to show that she suffered specific damage as a result of the successive delay. As the Tribunal has stated, an inordinate delay 'not only adversely affects the administration of justice but on occasions can

inflict unnecessary anxiety and suffering to an Applicant'" (cf. Judgements No. 353, *El Bolkany* (1985) and No. 414, *Apete* (1988).

XX. In addition, the Tribunal states that in the present case, the Applicants suffered considerably from all these delays. Merely to restore retroactively the situation that should have been that of the two Applicants when they worked at the United Nations cannot enable the two Applicants to relive all those years during which they were deprived of their proper status. Indeed, they consider that they have suffered more or less permanent damage as a result of the discrepancy between the grade that ought to have been accorded to them and the salary paid to them which corresponded to a lower grade. Undoubtedly, the fact that, year after year, they were at a level lower than that corresponding to the description of the duties performed is far from satisfactory. This is what the two Applicants explained in their applications, asking to be compensated for the numerous disadvantages arising from the non-recognition of their work in the service of the United Nations which they describe as follows:

"(i) The official silence over the years, on their several enquiries, (ii) the inordinate stalling and delay in considering their cases, and (iii) the irreparable action placed the Applicants in an inequitable situation in which their standing and authority in the Organization were undermined, they were denied career opportunities and training open to other staff at the classified levels of the subject posts, and they were denied compensation commensurate with their titles, job descriptions and the duties and responsibilities of their posts for a period of more than nine years in Ms. Sabet's case and four and half years in Ms. Skeldon's case."

They had previously drawn the attention of the Administration to these daily infringements of their conditions of service. For example, the Applicant Sabet explained in a letter of 28 November 1996 all the adverse consequences of the situation in which she found herself.

"The non-implementation of the classification of these posts through the failure to budget them at their appropriate level has had a number of consequences. It has diminished the career prospects of editorial staff in the United Nations in contradistinction to the decision of the General Assembly, in its resolution 35/225 of 17 December 1980 on the job classification and career development of language staff, that 'translators, interpreters, verbatim reporters, editors, copy-preparers and proof-readers [should] benefit from the reclassification measures'. It has resulted in functional discontinuity in the staffing table of the Editorial Services Section since the range of grade levels in the Section does not accurately reflect the increasingly complex and specialized nature of the assignments performed. It has led to inequitable treatment of staff serving on these posts; despite performing their duties and responsibilities at the higher classified level of the posts, the Organization has

> remunerated them at the lower budgeted level. It has impaired the Section's ability to attract and retain qualified editors, and the resulting chronic shortage of the appropriate expertise has undermined the ability of ESCAP to exercise effective oversight of its documentation and publication."

Similarly, the Applicant Skeldon wrote a letter to the Administration on 4 August 2000 explaining that she preferred to resign in view of the innumerable difficulties besetting her career development:

> "I have informed the Chief of Administration that I do not wish to continue working for the Organization after my present contract finishes on 30 November 2000, although I was not due to retire until January 2002 ... There has been a long history of bureaucratic bungling associated with the two posts in the Section: the Chief's and mine ... For five full years ... I will have been carrying out the functions of a higher-level post with remuneration at a lower level ... I am no longer willing to accept the conditions of work that I have described above."

XXI. In summary, the Tribunal considers that by not carrying through the procedure for the classification of the posts of the two Applicants in the Editorial Services Section of ESCAP, and the promotion procedure, the Administration violated the entitlements of members of the staff of the United Nations under the Staff Rules and violated the principle of equality of treatment of staff members with identical rights and duties. The Tribunal considers that the Administration has a duty to reconstitute their careers retroactively and to promote them as from the respective dates on which they had served the minimum time in the grades in which they found themselves as though the posts had actually been classified at the proper time, while compensating them in order to take account of the particularly unacceptable conditions which attended the career development of the two Applicants.

XXII. For the above reasons, the Tribunal:

1. Decides, in the case of the Applicant Sabet, that the Administration must restore the situation that would have existed if she had been promoted to grade P-5 with effect from 1 March 1996 at which date she had been at grade P-4 for five years, giving her compensation equivalent to the salary and other benefits she ought to have received up to 1 January 2000 on which date the Applicant Sabet was finally paid a salary equivalent to grade P-5;

2. Decides, in the case of the Applicant Skeldon, that the Administration must restore the situation that would have existed if she had been promoted to grade P-4 with effect from 1 December 1998 at which date she had been at grade P-3 for three years, giving her compensation equivalent to the salary and other benefits she

ought to have received up to 1 January 2000 on which date the Applicant Skeldon was finally paid a salary equivalent to grade P-4;

3. Orders also, for the Applicant Sabet, the payment of one year's salary for the incoherent and inequitable development of her career for nearly 10 years and, for the Applicant Skeldon, the payment of six months' net salary for the incoherent and inequitable development of her career for nearly five years;

4. Rejects all other pleas.

(Signatures)

Julio **Barboza**
President

Omer Yousif **Bireedo**
Member

Brigitte **Stern**
Member

Geneva, 25 July 2003

Maritza **Struyvenberg**
Secretary